UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
CASE NO.: 08-61317-CIV-GOLD
(Related Case No: 08-61335-CIV-GOLD)

AURELIUS CAPITAL MASTER, LTD., et al.,

Appellants,

v.

TOUSA INC., et al.,

Appellees.
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ORDER DISMISSING APPEALS; AFFIRMING ORDER OF BANKRUPTCY COURT; CLOSING CASE

This CAUSE is before the Court on the appeals by Aurelius Capital Master, Ltd., Aurelius Capital Partner LP, GSO Special Situations Fund L.P., GSO Special Situations Overseas Master Fund Ltd., GSO Credit Opportunities Fund (Helios), L.P., and Carlyle Strategic Partners (collectively, the "Minority Noteholders") and Wells Fargo Bank N.A. of the Stipulated Final Order Granting Motion To Use Cash Collateral (the "Cash Collateral Order" or "Order") [Bankr. DE 1226] entered on June 20, 2008 by the United States Bankruptcy Court for the Southern District of Florida. The respective appeals brought by Minority Noteholders and Wells Fargo were consolidated on September 8, 2008 [DE 10]. Having carefully reviewed the pleadings and the relevant case law and after holding oral argument on these appeals on December 19, 2008, I issued an Interim Order Affirming the Cash Collateral Order [DE 61]. Below is my final order setting forth the reasons for my affirmance.

I. INTRODUCTION

Minority Noteholders and Wells Fargo challenge the entry of the Cash Collateral Order, but each objects to a different aspect of the Order. By virtue of the relief they seek on appeal and the complex developments in the Debtors' ongoing reorganization, their appeals present an array of interrelated issues that implicate not only the merits of the appeals, but threshold issues of justiciability and jurisdiction. I first review the critical background relevant to their respective appeals, and then discuss Appellants' respective positions and the relief they seek from this Court. I then proceed to analyze the threshold justiciability issues of mootness and standing, and next consider whether I have jurisdiction to hear these appeals, before discussing the merits of the appeal. For the reasons set forth below, I conclude that the appeals must be dismissed for mootness and lack of standing, the Cash Collateral Order is not a final order, and leave to appeal should not be granted. Even if these appeals were justiciable and I have jurisdiction, the appeals fail on the merits. Accordingly, the appeals are dismissed and the Cash Collateral Order is affirmed.

II. BACKGROUND

A. Debtor's Bankruptcy

On January 29, 2008, Tousa Inc. (the "Debtor") and its affiliated debtors (collectively with Tousa, the "Debtors")[1] filed a voluntary petition for relief under Chapter

[1] The Debtors in the cases are: Tousa, Inc.; Engle Homes Commercial Construction, LLC; Engle Homes Delaware, Inc.; Engle Homes Residential Construction, L.L.C.; Engle Sierra Verde P4, LLC; Engle Sierra Verde P5, LLC; Engle/Gilligan LLC; Engle/James LLC; LB/TE #1, LLC; Lorton South Condominium, LLC; McKay Landing LLC; Newmark Homes Business Trust; Newmark Homes Purchasing, L.P.; Newmark Homes, L.L.C.; Newmark

11 of the Bankruptcy Code. Each Debtor is continuing in the management and possession of its business and properties as a debtor-in-possession pursuant to sections 1107 and 1108 of the Bankruptcy Code. No request has been made for the appointment of a trustee or examiner. A statutory committee of unsecured creditors (the "Creditors' Committee") was appointed on February 13, 2008.[2]

The cash collateral at issue in the Cash Collateral Order originated from three prepetition secured credit agreements (the "Prepetition Credit Facilities") between Debtors and various lenders (the "Prepetition Lenders"). The Prepetition Credit Facilities included a First Lien Revolving Credit Agreement ("First Lien Revolver"), a First Lien Term Loan Credit Agreement ("First Priority Loan"), and a Second Lien Term Loan Credit Agreement ("Second Priority Loan"). The administrative agents for the First Priority Loan and the Second Priority Loan were Citicorp North America, Inc. ("CNAI") and Wells Fargo, respectively.

On the date of their Petition, Debtor filed a motion with the Bankruptcy Court seeking authority to obtain secured post-petition financing ("DIP Financing") on a

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Homes, L.P.; Preferred Builders Realty, Inc.; Reflection Key, LLC; Silverlake Interests, L.L.C.; TOI, LLC; Tousa Associates Services Company; Tousa Delaware, Inc.; Tousa Funding, LLC; Tousa Homes Arizona, LLC; Tousa Homes Colorado, LLC; Tousa Homes Florida, L.P.; TOUSA Homes Investment #1, Inc.; Tousa Homes Investment #2, Inc.; TOUSA Homes Investment #2, LLC; Tousa Homes Mid-Atlantic Holding, LLC; Tousa Homes Mid-Atlantic, LLC; Tousa Homes Nevada, LLC; Tousa Homes, Inc.; Tousa Homes, L.P.; Tousa Investment #2, Inc.; Tousa Mid-Atlantic Investment, LLC; Tousa Realty, Inc.; Tousa, LLC; and Tousa West Holdings, Inc.

[2] The Committee consists of seven entities: Wilmington Trust Co., as indenture trustee; HSBC Bank USA, N.A., as indenture trustee; Trapeza CDOX, Ltd.; Capital Research and Management Company; SMH Capital Advisors, Inc.,; Geotek, Inc./ Geotek Insite, Inc.; and SelectBuild Arizona.

super-priority and priming lien basis and authority to use cash collateral of the lenders under the Prepetition Credit Facilities, which was granted by the Bankruptcy Court [Bankr. DE 113] (the "DIP Order").

Although Debtor secured immediate postpetition financing on an interim basis, Debtor did not seek final approval of DIP Financing because Debtor's cash holdings were sufficient to meet projected funding needs. Instead, pursuant to 11 U.S.C. § 363(c)(2)(A), Debtors entered into negotiations with CNAI and the Creditors' Committee regarding the terms on which the Debtors may continue to use the Prepetition Lenders' cash collateral upon expiration of the DIP Order. Wells Fargo was not engaged in the negotiations because it was purportedly bound by the decisions of CNAI pursuant to an Intercreditor Agreement between the two parties. *See* Section II.B.2, *infra*.

Debtor moved nominally for authority to use cash collateral on April 25, 2008 [Bankr. DE 880], and supplemented its motion on May 19, 2008 with a proposed consensual cash collateral order [Bankr. DE 999]. As proposed, the cash collateral order authorized the Debtors to use the cash collateral. It affords the Prepetition Lenders with, among other things, a cash payment to the lenders under the First Lien Revolver and the First Priority Loan in the amount of $175 million, plus an additional payment of $15 million at Debtors' discretion (the "Paydown"), subject to disgorgement if the Creditors' Committee succeeds in avoiding the Prepetition Lenders' claims (the "avoidance action"). *See* Section II.C, *infra*. The proposed order also authorized the grant of liens and allowed administrative priority claims on substantially all of the Debtors' assets to the extent of any diminution on the value of the Prepetition Lenders' collateral, and permitted

carve-outs from the claims and liens granted to the Prepetition Lenders for the professional fees incurred by Debtors and the Creditors' Committee. Minority Noteholders [Bankr. DE 1044, 1142] and the Creditors' Committee [Bankr. DE 1141] objected to any paydown of the principal to the Prepetition Lenders, but the Creditors' Committee withdrew its objection prior to the entry of the Cash Collateral Order as a result of continued negotiations with Debtors and CNAI. [Bankr. DE 1349, at 24].

Hearings on the cash collateral order were held on May 22, 2008 and again on June 10, 2008.[3] At the June hearing, the Bankruptcy Court concluded that conditions to the Paydown provision had to be strengthened. It concluded that requiring the First Lien Lender or its affiliates to prove it has liquid assets exceeding 200% of the amounts being repaid was insufficient to protect the interests of unsecured creditors because there was no requirement that such assets be unencumbered. [Bankr. DE 1215, 8-9]. The Bankruptcy Court further instructed the proposed cap on the professional fees for use by Wells Fargo and the Committee be removed and permitted the use of the cash collateral to fund the professional fees associated with the avoidance action. [Bankr. DE 1214, 271:16]. The Cash Collateral Order as entered ultimately provided that in order to receive the adequate protection payments, the First Lien Lender (or a guarantor) must certify that it maintains a net asset value in excess of eight times the amounts being repaid *and* is in possession and control of liquid assets exceeding either 400% of the amount to be repaid to the extent the liquid assets are encumbered or 200% to the extent the liquid assets are unencumbered [Order, ¶ 7(d)(III)(x)]. The Order further permitted

[3] Debtors' Chief Restructuring Officer, John Boken, and Chief Financial Officer, Thomas McAden testified.

the use of the cash collateral by the Creditors' Committee to contest the validity of the Prepetition Secured Liens or to assert or prosecute any actions, claims or causes of action against any of the Prepetition Lenders without their consent. [Order ¶ 13]. A telephonic hearing to discuss the latest changes made to the proposed Cash Collateral Order was held on June 19, 2008, and the Cash Collateral Order was entered on June 20, 2008 [Bankr. DE 1226].

B. The Cash Collateral Order

1. Consensual Nature of the Cash Collateral Order

The Cash Collateral Order is a comprehensive and detailed order that sets forth the agreement between the Debtors, First Lien Lenders, and the Creditors' Committee on the conditions for the use of cash collateral. The Order funds ongoing business operations, provides protections for the Prepetition Lenders who are the secured creditors, contains provisions for the Paydown and potential disgorgement of such payments, and provides for litigation fees and costs to fund the avoidance action.

Cash collateral stipulations are a type of agreement which exist solely because of the Bankruptcy Code (the "Code"). The Code explicitly provides for a consensual cash collateral order. 11 U.S.C. § 363(c)(2) provides in pertinent part that:

> The trustee may not use, sell or lease cash collateral under paragraph (1) of this subsection unless – (A) each entity that has an interest in such cash collateral consents; or (B) the court, after notice and a hearing, authorizes such use, sale, or lease in accordance with the provisions of this section.

Therefore, under 11 U.S.C. 363(c)(2), a debtor is presented with a choice as to how to secure authority to use cash collateral: either to obtain consent of the secured lenders that

have an interest in cash collateral, or to seek by means of a contested hearing to use cash collateral over a secured lender's objection.[4] In this case, repeated testimony by the Debtor reflected its desire to proceed under 11 U.S.C. § 363(c)(2)(A) and over the course of several months attempted to come to a cash collateral order that would have consent of the secured creditors. As John Boken, Debtors' Chief Restructuring Officer, explained to the Bankruptcy Court the risk of protracted litigation over access to cash collateral would be highly undesirable by putting financing in doubt during a depressed housing market.[5] This testimony was uncontroverted.

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[4] As agreed by the parties and as supported by case law, the entities that have an interest in the cash collateral from whom consent is required are those entities with a secured interest in the cash collateral. *E.g., In re Blackwood Associates, L.P.*, 153 F.3d 61, 67 (2d Cir. 1998) (stating that § 363(c)(2)(A) involves seeking the consent of a secured creditor).

[5] At the June 10 hearing, Mr. Boken provided several reasons why the Debtors chose not have "an adequate protection fight or hearing before the Court."

> First is we viewed a fight as being detrimental to the business, both in terms of the employee base and vendors and customers and we felt that a fight could have a significant impairment on our operations and ultimately, on the value of the business.... [T]he three primary components of our operations are our employees, our relationships with our vendors and our customers, and to the extent that there is a perception created amongst any one of those three components of value that there is instability in the business or that there is significant disagreement amongst the creditor constituencies as to whether TOUSA should continue to operate, their willingness or likelihood of them continuing to, either in the case of customers want to buy homes, in the case of vendors to provide us goods and services, in the case of employees to stay with the company as opposed to moving on to other opportunities, would all be significantly at risk.

[Bankr. DE 1214, 284:21].

Mr. Boken further attested in a May 20, 2008 declaration that Debtors wanted to reach a consensual use of cash collateral because continued access to cash was

Debtor proceeded to negotiate a consensual cash collateral order with the First Lien Lenders and the Creditors' Committee [Bankr. DE 999, ¶ 5]. As recounted by the briefs and supported by the record below, the negotiations were extensive, complex, with multiple drafts and competing language being considered. Although the Debtors believed a consensual agreement was in the best interest of the estate, the Debtors made clear that they were prepared to oppose the First Lien Lenders' proposals if they were not prepared to negotiate a reasonable compromise. *Id.* at ¶ 9. The first phase of these negotiations resulted in agreement between Debtors and the First Lien Lenders, and the parties attempted to incorporate certain elements into the Order to secure the consent of the Creditors' Committee, including a draft disgorgement provision so as not to impair Creditors' Committee's or any other party's ability to pursue claims against the Prepetition Lenders. *Id.* at ¶ 28. The Creditors' Committee acknowledged Debtors' efforts to accommodate its objections, but continued to disagree with respect to several provisions of the proposed order. [Bankr. DE 1129, ¶¶ 7-8]. Ultimately, however, the Cash Collateral Order as entered received the consent of the Creditors' Committee, which indicated at the June 19 hearing that it consented only after extensive negotiations. [Bankr. DE 1349, 23:25].

In sum, the record before the Bankruptcy Court established that these parties reached a consensus on the Cash Collateral Order, with input from the Bankruptcy Judge

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critical to the survival of the business, and that possibility that Debtors could no longer access cash was a risk associated with a contested cash collateral hearing. Such a possibility would have significant adverse impacts on the Debtors, including departure of key employees and vendors and other third parties declining to do business with the Debtors. [Bankr. DE 1009, ¶¶ 27, 28, 32].

regarding changes to specific provisions. The Cash Collateral Order reflected a compromise between the interests and concerns of the Debtor, the First Lien Lenders, and the Creditors' Committee. Each of the Debtors, the First Lien Lenders, and the Committee agreed to the terms of the Order as a whole.

2. Consent of Wells Fargo

The Cash Collateral Order was predicated on the consent of the First Lien Lenders. Wells Fargo, agent for the Second Lien Lenders and also secured creditors, were not involved in the negotiation of the Cash Collateral Order. On May 21, 2008, Wells Fargo filed a Statement of Qualified Support in which it generally consented to the terms of the Cash Collateral Order. [Bankr. DE 1038, ¶ 5]. The consent was subject to two objections: (1) that it "does not consent, and hereby objects, to any use of its Cash Collateral to fund a Committee Fee Cap in excess of $450,000. There should be no circumstances under which [its] Cash Collateral should be used to fund a Committee Fee Cap in an amount greater than the Second Lien Fee Cap." [Bankr. DE 1038, ¶ 9]; and (2) "under no circumstances does [it] consent to the use of any of its Cash Collateral, including any of the proposed $450,000 Committee Fee Cap, to investigate or to pursue the causes of action against [it] and the Second Lien Lenders that the Creditors' Committee is seeking authority to pursue." [Bankr. DE 1038, ¶ 11]. The first objection was withdrawn prior to entry of the Cash Collateral Order because the cap on professional fees was removed, as discussed above.

Although Wells Fargo's Statement of Qualified Support contained limited objections to the proposed cash collateral order, it had previously entered into an Intercreditor

Agreement [DE 58] with the First Lien Lenders on July 31, 2007, which set forth the relative rights of the First Lien Revolver, the First Lien Term Loan and the Second Lien Term Loan.[6] Pursuant to the Intercreditor Agreement, Wells Fargo was deemed to consent to any cash collateral agreement among Debtors and the First Lien Lenders. Specifically, Section 5.2 of the Intercreditor Agreement provides, in relevant part:

> If any Credit Party becomes subject to any Insolvency Proceeding and if the First Priority Representative desires to consent (or not object) to the...use...of cash or other collateral under the Bankruptcy Code...then the Second Lien Term Loan Agent agrees, on behalf of itself and the other Second Priority Secured Parties that each Second Priority Secure Party (I) will be deemed to have consented to...the...use...of such cash or other collateral...[and] (ii) will not request or accept any form of adequate protection or any other relief in connection with the...use...of such cash."[7]

The Bankruptcy Court made reference to the Intercreditor Agreement on numerous

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[6]CNAI was the administrative agent at the time the Second Lien Credit Agreement was entered into. Pursuant to the Successor Agent and the Amendment Agreement dated January 25, 2008, Wells Fargo was substituted for CNAI as Administrative Agent in connection with the Second Lien Credit Agreement.

[7] Wells Fargo argues that the Intercreditor Agreement cannot be considered because it was never made a part of the record before the Bankruptcy Court. Even assuming this was the case, the Intercreditor Agreement was discussed with the Bankruptcy Judge and it is further referenced in the Cash Collateral Order [Order, ¶ E]. Moreover, while appellate courts generally do not consider evidence that the parties did not submit in proceeding below, they have the power to do so when doing so is in the interests of justice and judicial economy. *Ouachita Watch League v. Jacobs*, 463 F.3d 1163, 1170-71 (11th Cir. 2006) (in the interests of justice and judicial economy, court permitted supplementation of appellate record to resolve issues of standing and mootness that would be case-dispositive); *see also Young v. DeVaney ex rel. City of Augusta, Ga.*, 59 F.3d 1160, 1168 (11th Cir. 1995). Consequently, at oral argument held on December 19, 2008, I ordered Wells Fargo to supplement the appellate record with the Intercreditor Agreement because of its relevance to issues of standing. *See* Section V.A.2, *infra*.

occasions in the Cash Collateral Order, although not specifically citing to Section 5.2.[8] Likewise, during the hearings, the parties referenced the Intercreditor Agreement on several occasions.[9] With this background, the Bankruptcy Court overruled the remaining objection by Wells Fargo and deemed the Cash Collateral Order to be consensual.[10]

C. Avoidance Action

As discussed above, the disgorgement provisions included in the Cash Collateral Order were included to permit the Creditors' Committee or any other party to commence

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[8] The Cash Collateral Order explicitly recognizes the existence of the Intercreditor Agreement between CNAI and Wells Fargo. [Order, ¶ E]. Under a paragraph entitled Second Priority Secured Obligations, the conditions governing validity of second priority liens require giving effect to any "applicable subordination or intercreditor agreements. [Order, ¶ D(4)]. The Intercreditor Agreement is further referenced in ¶¶ 7(c), 7(d), and 16(c), which concern payment of interest and fees, adequate protection payments, and challenges to the validity of various secured liens.

[9] At the May 22 hearing, it was noted to the Bankruptcy Court by Debtor's counsel that "[t]he way the intercreditor works is if we were not able to obtain the consent of the first lien lenders to the consensual use of cash collateral, we would have to show adequate protection through the second lien debt, as well." [Bankr. DE 1076, 216:24]. Subsequently, counsel for Wells Fargo noted that "we do have an intercreditor agreement that says the first liens can consent on our behalf to adequate protection...we both question whether that is applicable under these circumstances...." *Id.* at 274:7. At the June 10 hearing, counsel for Debtors again stated, "[t]he way out intercreditor agreement works...is...if [First Lien Lenders] consent to the use of cash collateral, the [Second Lien Lenders] cannot object without [CNAI's] permission and, therefore, if I have the consent of the First Lien Lenders, I don't believe I need to show adequate protection through the second lien debt." [Bankr. DE 1214, 251:12]

[10] Paragraph I of the Cash Collateral Order states: "No Prepetition Secured Party Objections. (a) The First Priority Agents have consented, (b) the First [Lien] Lenders have consented, or have not objected, (c) the Second Priority Agent and the Second Priority Lenders Group...have consented (subject to the Second Priority Agent's Objection), and (d) the remaining Second Priority Lenders have consented, or have not objected, to the Debtors' use of the Secured Lenders' Cash Collateral and such consent is expressly conditioned upon the consideration as provided in this Order...." Subsequently, paragraph 1 of the Order provides that "all objections have either been withdrawn or are hereby overruled."

suit against the Prepetition Lenders and their Agents to avoid their priority claims to the cash collateral. On May 8, 2008, the Bankruptcy Court granted the Creditors' Committee leave, standing, and authority to prosecute these avoidance actions with respect to the claims of the Secured Prepetition Lenders on behalf of the debtors' estates. [Bankr. DE 1092]. The court found specifically that the legal and factual bases set forth in the Committee's motion filed April 22, 2008 [Bankr. DE 850] established just cause for the action. On July 14, 2008, in a separate adversary proceeding also before the same Bankruptcy Court (Case No. 08-01435), the Creditors' Committee commenced its action, asserting that certain subsidiaries of Debtor did not receive fair value in exchange for incurring the debt under the Prepetition Credit Facilities.

III. APPELLANTS' POSITIONS AND RELIEF SOUGHT

A. Minority Noteholders

Minority Noteholders filed objections to the proposed cash collateral order on May 21, 2008 and June 6, 2008 in response to the negotiations taking place between the Debtors, First Lien Lenders, and the Creditors' Committee.[11] [Bankr. DE 1044, 1142]. In these filings, Minority Noteholders maintain their objection to the Paydown provisions because adequate protection payments to the Prepetition Lenders should be disallowed in the absence of a showing of diminution of value of the cash collateral caused by the Debtors' use of the cash collateral.

On appeal, the Minority Noteholders argue in their brief that the showing of

[11] Minority Noteholders are unsecured creditors who collectively own a significant proportion of Debtor's senior unsecured notes and senior subordinated unsecured notes.

diminution of value is required when adequate protection payments are made to a party pursuant to 11 U.S.C. § 361(1) and that the Bankruptcy Court erred by deferring to the business judgment of the Debtors in permitting the Paydown. They further argue that the Cash Collateral Order improperly permits the payment of disputed claims prior to allowance. Finally, they contend that the Bankruptcy Court had no basis to establish an arbitrary and abbreviated bar date of July 26, 2008 for all challenges to the Prepetition Lenders' claims and liens.[12]

The stated relief sought by Minority Noteholders has changed over the course of this appeal. Initially, Minority Noteholders sought a reversal of the Cash Collateral Order, but take a narrower position in subsequent filings, in which they request the return of the Paydown [DE 40, at 9]. As confirmed at oral argument, Minority Noteholders now seek only the excision of the Paydown provision from the Cash Collateral Order and the return of $175 million to Debtor for its continued business operation.

B. Wells Fargo

As discussed above, and as reflected by the Cash Collateral Order, Wells Fargo had not withdrawn the portion of its objection concerning the use of the cash collateral to fund the professional fees of the Creditors' Committee to investigate and pursue claims against Wells Fargo. [Order, ¶ H]. On appeal, Wells Fargo argues that because it did not

[12] Minority Noteholders confirmed at oral argument that they have all filed their avoidance actions against the Prepetition Lenders prior to the bar date. Their timely filing renders moot their appeal on the bar date. Further, by the terms of the bar date provision, once claims are timely filed, the amendments or supplements to such a timely action "shall be governed by the applicable Federal Rules of Civil Procedure or other applicable law." [Order, ¶ 16(b)]. Their argument that an issue remains for appeal because the bar date may prevent future amendments or supplementation to their action are therefore misplaced.

consent to the Cash Collateral Order, Debtor was required to prove that Wells Fargo was adequately protected before its cash collateral could be used.[13] In their briefs, Wells Fargo requests as relief either the reversal of the Order or a modification of the Order to remove the provision authorizing the use of cash collateral to fund litigation against Wells Fargo. [DE 8, at 20]. At oral argument, Wells Fargo requests that I excise the provisions of the Cash Collateral Order that permit the expenditure of cash collateral to fund the avoidance litigation by the Committee and disgorge the fees already paid, or in the alternative, to remand to the Bankruptcy Court to determine whether Wells Fargo has adequate protection for this use of the cash collateral.

IV. STANDARD OF REVIEW

District courts sit as appellate courts over bankruptcy decisions. *Miner v. Bay Bank & Trust Co.* (*In re Miner*), 185 B.R. 362, 365 (N.D. Fla. 1995), aff'd, 83 F.3d 436 (11th Cir. 1996). A district court reviews a bankruptcy court's legal conclusions *de novo*, *In re Englander*, 95 F.3d 1028, 1030 (11th Cir. 1996), and factual findings for clear error, Fed. R. Bankr. P. 8013; *In re Gamble*, 168 F.3d 442, 444 (11th Cir. 1999). When district courts review the factual findings of a bankruptcy court, the burden is on the appellant to show that the bankruptcy court's findings are clearly erroneous. *Acquisition Corp. of Am. v. Fed. Sav. & Loan Ins. Corp.*, 96 B.R. 380, 382 (S.D. Fla. 1988). A finding of fact is not clearly erroneous unless "this court, after reviewing all the evidence, is left with the definite

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[13] Only Wells Fargo asserts that the Cash Collateral Order was non-consensual. Minority Noteholders do not base any part of their appeal on this argument. Rather, Minority Noteholders maintain that the consensual nature of the Cash Collateral Order does not cure violations of the Bankruptcy Code.

and firm conviction that a mistake has been committed." *IBT Int'l, Inc. v. N.* (*In re Int'l Admin. Serv., Inc.*), 408 F.3d 689, 698 (11th Cir. 2005) (internal citations omitted).

This Court may further review the stipulated Cash Collateral Order under an abuse of discretion standard. *In re Van Diepen, P.A.*, 236 Fed. App. 498, 501 (11th Cir. 2007). A court abuses its discretion where it fails to apply the proper legal standard or to follow proper procedures in making the determination, or bases an award upon findings of fact that are clearly erroneous. *In re Red Carpet Corp. of Panama City Beach*, 902 F.2d 883, 890 (11th Cir. 1990).

V. DISCUSSION

Before reaching the merits of the consolidated appeals, I first discuss the threshold issues of justiciability and jurisdiction. I conclude that these appeals are non-justiciable for reasons of standing and mootness, and that I lack jurisdiction to resolve these appeals. Even if I were to conclude otherwise, I nonetheless conclude on the merits of the appeal that the Cash Collateral Order should be affirmed.

A. Justiciability

1. Standing

In the bankruptcy context, a person has standing to appeal a bankruptcy court order if she is a "person aggrieved" by the order. *In re Vick*, 233 Fed. App. 897, 898 (11th Cir. 2007) (relying on *In re Westwood Community Two Ass'n, Inc.*, 293 F.3d 1332, 1335 (11th Cir. 2002)); *In re Cummings*, 381 B.R. 810, 830-31 (S.D. Fla. 2007) . "Aggrieved" parties in the bankruptcy context are "those parties having a direct and substantial interest in the question being appealed." *In re Odom*, 702 F.2d 962, 963 (11th Cir. 1983) (citation

and internal quotation marks omitted). The person-aggrieved doctrine is *more restrictive than traditional Article III standing*, as it allows a person to appeal a bankruptcy order only when they are "directly and adversely affected pecuniarily by the order." *In re Westwood*, 293 F.3d at 1335 (emphasis added). Thus, standing is limited to persons with a financial stake in the order being appealed such that the order diminishes her property, increases her burden, or impairs her rights. *Id.* (citations omitted). Mere appearance in a bankruptcy proceeding does not give a party standing to appeal an order of the bankruptcy court. *Id.* at 1336 (adopting *In re Thompson*, 965 F.2d 1136, 1141-42 (1st Cir.1992)).[14]

a. Minority Noteholders

In the absence of a successful avoidance action, Minority Noteholders, as unsecured creditors, stand behind the Prepetition Lenders in priority for the recovery of monies owed to them. As such, Minority Noteholders are in effect appealing the payment of $175 million owed to lenders who are ahead of the Minority Noteholders in priority, namely, the First Lien Lenders. Therefore, even if the Paydown at this stage were improper, Minority Noteholders suffers no direct pecuniary injury as they are not entitled to any portion of the $175 million. *In re Combustion Eng'g, Inc.*, 391 F.3d 190, 217 (3d Cir. 2004) (insurers had no standing to appeal confirmation of reorganization plan where it did not modify insurers' rights); *In re Merrifield*, 214 B.R. 362, 366 (B.A.P. 8th Cir. 1997)

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[14] Both a Creditors' Committee and an ordinary creditor are considered a "party-in-interest" who may raise and may appear and be heard on any issue. 11 U.S.C. § 1109. A party-in-interest, however, does not automatically confer standing to appeal the order of a Bankruptcy Court.

(debtor lacked standing to appeal from bankruptcy court order determining that debtor's prepetition transfer of assets could not be avoided, because returning assets to debtor's estate would only increase amount received by debtor's creditors, and would not provide any benefit to debtor herself). As conceded by Minority Noteholders at oral argument, their interest in bringing this appeal is to seek the return of the $175 million payment to the estate, which in their belief would bolster Debtor's reorganization efforts and enable Minority Noteholders to recover the money owed to them. Such an interest is at best an indirect pecuniary interest, especially where there is no evidence, and I cannot assume, that the Paydown has jeopardized the ability of Tousa to enter into a successful reorganization and impaired the rights of Minority Noteholders to be repaid.[15]

b. Wells Fargo

Wells Fargo has no standing to pursue its appeal because despite its limited objection, it was deemed to have consented to the Cash Collateral Order by the Bankruptcy Court and therefore cannot be considered an aggrieved party. Pursuant to Article 5.2 of the Intercreditor Agreement, Wells Fargo is barred from "request[ing] any form of adequate protection or any other relief in connection with the use of the cash." Put differently, Wells Fargo had bargained away its right to object by entering into the Intercreditor Agreement.

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[15] Minority Noteholders *do* have a direct and substantial interest in the avoidance litigation challenging whether the Prepetition Lenders have a legitimate claim to the cash collateral, in other words, whether they are not ahead of Minority Noteholders in priority. Such a position implicates Minority Noteholders' direct pecuniary interest, as it would mean the $175 million should have been used to pay Minority Noteholders and not the First Lien Lenders. Minority Noteholders have acknowledge that the avoidance litigation is being pursued on their behalf by the Creditors' Committee.

Wells Fargo argues that the Bankruptcy Court did not rely on the Intercreditor Agreement or otherwise provide any valid basis for overruling the Objection either at the hearings or in the Order. As discussed above, the Intercreditor was referenced in the Cash Collateral Order and at hearings before the Bankruptcy Court. Further, appellate courts have the authority to sustain the lower court's ruling for reasons different from the reasons, if any, relied on. *Adams v. Fla. Power Corp.*, 255 F.3d 1322, 1326 n.1 (11th Cir. 2001) (decision of lower court must be affirmed even though the lower court relied upon a wrong ground or gave a wrong reason) (relying on *Sec. & Exch. Comm'n v. Chenery Corp.*, 318 U.S. 80, 88, 63 S. Ct. 454, 87 L. Ed. 626 (1943)). Accordingly, the Bankruptcy Court appropriately overruled Wells Fargo's objection and its finding that the Cash Collateral Order was a consensual one on the basis that under the Intercreditor Agreement, Wells Fargo was deemed to have consented to the Cash Collateral Order.[16]

2. Equitable Mootness

Dismissal of the appeals is further warranted on the ground of equitable mootness.

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[16] Wells Fargo argues that the Intercreditor Agreement cannot mean that it has consented to the Cash Collateral Order because the only party with power to enforce Section 5.2 of the Agreement is the First Priority Agent and the First Priority Agent chose not to do so. This argument is misplaced. The Debtors and the Creditors' Committee do not seek to be a beneficiary of the Intercreditor Agreement; they merely point to the Intercreditor Agreement to support the legal conclusion that the Cash Collateral Order should be considered consensual. There is no dispute that the Intercreditor Agreement is valid, binding, and in effect. Further, a review of the June 10, 2008 hearing transcript cited by Wells Fargo indicates that CNAI was not "forcing" consent on Wells Fargo because at that point, both parties objected to the use of cash collateral to fund litigation against them. CNAI had withdrawn that objection by the time the Cash Collateral Order was entered. Indeed, CNAI confirms on appeal that the Cash Collateral Order was deemed consented to by Wells Fargo under the Intercreditor Agreement [DE 30, at 9].

"The mootness doctrine, as applied in a bankruptcy proceeding, permits the courts to dismiss an appeal based on its lack of power to rescind certain transactions." *In re Winn-Dixie Store, Inc.*, 286 Fed. App. 619, 623 (11th Cir. 2008) (citing *In re Holywell Corp.*, 911 F.2d 1539, 1543 (11th Cir. 1990)). In bankruptcy, the mootness doctrine recognizes that at some point the case has progressed so far that it is impossible to unwind all that has been done. Central to a finding of mootness is a determination by an appellate court that it cannot grant effective judicial relief. *Id.*; *In re Seidler*, 44 F.3d 945, 947-48 (11th Cir. 1995). The test for determining whether such relief is possible is whether the reorganization plan has been so substantially consummated that effective relief is no longer available." *In re Club Assocs.*, 956 F.2d 1065, 1069 (11th Cir. 1992). The test reflects a court's concern for striking the proper balance between the equitable considerations of finality and good faith reliance on a judgment and the competing interests that underlie the right of a party to seek review of a bankruptcy court order adversely affecting him. *Id.* Further, in the bankruptcy setting, even if effective relief may conceivably be fashioned, where implementation of that relief would be inequitable, the appeal may be determined to be moot. *In re McGregory*, 223 Fed. App. 530, 531 (8th Cir. 2007); *In re Little*, 253 B.R. 427, 430 (B.A.P. 8th Cir. 2000).

The mootness inquiry requires the court to look to various subsidiary questions, including (1) a consideration of the interests of finality and the passage of time, (2) whether there has been a comprehensive change in the circumstances, (3) whether a stay has been obtained and if not, why not, (4) whether the debtor's reorganization plan has been substantially consummated and if so, what type of transactions have been

consummated, (5) the type of relief sought, (6) the effect of granting such relief on third parties not currently before the Court, and (7) the threat to the re-emergence of the debtor as a revitalized entity. *Miami Ctr. Ltd. P'ship v. Bank on N.Y.*, 838 F.2d 1547, 1554-55 (11th Cir.1988); *see also In re Club Assocs.*, 956 F.2d at 1069 n. 11; *In re American Body Armor & Equip., Inc.*, 172 B.R. at 662-63.

Applying this analytical framework of mootness to cash collateral orders, I conclude that the appeals are equitably moot.[17] As discussed above, I consider the Cash Collateral Order to be a consensual order that is an integrated whole negotiated and consented to by Debtor, the Prepetition Lenders, and the Creditors' Committee. Even though Appellants now limit their request to relief to the excision of specific, discrete, provisions of the Cash Collateral Order, permitting such relief would unravel the Cash Collateral Order, which was reached by consensus based on the inclusion of all of its components. *In re Delta Air Lines, Inc.*, 374 B.R. 516, 523 (S.D.N.Y. 2007) (to nullify a single provision in a substantially consummated settlement agreement while leaving the remainder of the agreement intact would ignore the tradeoff that allowed the parties to settle in the first instance and would treat a non-severable provision of the Settlement Agreement as dispensable); *In re Enron Corp.*, 326 B.R. 497, 503 (S.D.N.Y. 2005). In *Enron Corp.*, the Court held that appellant's challenge of an exculpatory plan provision in the confirmation

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[17] Other circuits have found cash collateral orders to be moot on appeal. For example, in *Dahlquist v. First Nat'l Bank*, 737 F.2d 733, 735 (8th Cir.1984), the Court dismissed an appeal of a cash collateral order because the $60,000 the debtors were authorized to use had already been spent. *See also In re Gilchrist*, 891 F.2d 559, 561 (5th Cir.1990) (appeal of bankruptcy judge's order authorizing sale of property moot once sale was conducted).

plan was equitably moot where the provision was negotiated by all parties, including the Creditors' Committee, and was found by the Bankruptcy Court to have been necessary for the negotiation of the plan, which enabled Enron to retain key employees involved in the bankruptcy petition by guaranteeing indemnification for their postpetition acts. The Court held "to pull away this string would thus tend to unravel the entire fabric of the [confirmation] plan, and would be inequitable to all those who participated in good faith to bring it into fruition." *Id.* Here, the provisions challenged by the Appellants were part and parcel of a consensual Cash Collateral Order, and the piecemeal excision of specific provisions integral to the negotiated whole undermines the requisite consent of the First Lien Lenders and would similarly be inequitable to the parties who in good faith arrived at a cash collateral order that provided a source of cash for Debtor's continued operations without the risks and uncertainty of a contested hearing.

Further, the Appellants concede that they did not seek, much less obtain, a stay. Although not dispositive to the availability of judicial relief, courts have declined to entertain any challenge to a confirmation plan which seeks to modify or amend its provisions, when, in absence of a stay, substantial consummation of the plan has been achieved. *In re Holywell Corp.*, 911 F.2d at 1543; *see In re Sewanee Land, Coal & Cattle, Inc.*, 735 F.2d 1294, 1295 (11th Cir. 1984) (quoting *Am. Grain Assoc. v. Lee-Vac, Ltd.*, 630 F.2d 245 (5th Cir. 1980) ("[I]n the absence of a stay, action of a character which cannot be reversed by the court of appeals may be taken in reliance on the lower court's decree. As a result, the court of appeals may become powerless to grant the relief requested by the appellant...[and] the appeal will be dismissed as moot."). In the absence

of a stay in this case, I similarly conclude that the appeal is equitably moot where there has been substantial consummation of the Cash Collateral Order. *See Miami Ctr. Ltd. P'ship*, 838 F.2d at 1555 (noting that dismissal of an appeal on grounds of mootness is often granted when reversal of the confirmation order would "knock the props out from under the authorization for every transaction that has taken place and create an unmanageable, uncontrollable situation for the Bankruptcy Court") (internal quotations and citations omitted); *see also In re Delta Air Lines, Inc.*, 374 B.R. at 524 (where distributions under Settlement Agreement already made to parties not before the Court and those transactions were irreversible, it was inequitable for court to hear appeal). Here, as a result of the entry of the Cash Collateral Order, the Debtor has entered into numerous transactions with third parties. Mr. Boken has attested that the cash collateral has been used to fund the Debtor's business operations and to make distributions pursuant to various orders of the Bankruptcy Court. [DE 23, ¶ 7]. Debtor has further assumed more than 150 leases of nonresidential real property and used the cash collateral to satisfy claims for monetary default under such leases.[18] *Id.* at ¶ 8. The failure to obtain a stay and the resulting substantial consummation of the Cash Collateral Order weighs in favor

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[18] Appellants argue that they do not seek to rescind transactions that Debtor may already have entered into, and ask that that I exercise my authority to reverse the Cash Collateral Order in part by removing only the offending provisions, thereby shaping effective relief. This argument misses the mark. As I have set forth above, severing these provisions disrupts the consent on which the Cash Collateral Order is predicated, and requiring a reformulation of the order that was the basis for substantial consummation of transactions by Debtors when no stay was sought or obtained would be inequitable to the Debtor. *In re Texaco Inc.*, 92 B.R. 38, 46-47 (S.D.N.Y. 1988) (finding appeal seeking to sever and rescind releases moot because releases were part of an "integrated settlement" and their rescission would "undermine the entire reorganization").

of finding equitable mootness.

Finally, because the piecemeal modification of the Cash Collateral will unravel the Cash Collateral Order and require a new cash collateral order to be fashioned at this stage of the bankruptcy proceeding, granting relief to Appellants poses a threat to the re-emergence of the debtor as a revitalized entity. Placing Debtor in the position to renegotiate a new cash collateral order or engage in a contested hearing to secure the use of cash for its business operations will likely undermine, as testified to by Debtor, the willingness of business partners and customers to continue to conduct business with Debtor and undermine a successful reorganization.

Although there is an exception to the mootness doctrine when the action being challenged by the lawsuit is capable of being repeated and evading review, the Eleventh Circuit has held that "this exception is 'narrow,' and applies only in 'exceptional situations.'" *Al Najjar v. Ashcroft*, 273 F.3d 1330, 1336 (11th Cir. 2001) (quoting *Dow Jones & Co. v. Kaye*, 256 F.3d 1251, 1256 (11th Cir. 2001)) (internal quotations omitted). In particular, the exception can be invoked only when "(1) there [is] a reasonable expectation or a demonstrated probability that the same controversy will recur involving the same complaining party, and (2) the challenged action is in its duration too short to be fully litigated prior to its cessation or expiration." *Sierra Club v. Martin*, 110 F.3d 1551, 1554 (11th Cir.1997) (emphasis added). Simply put, "[t]he remote possibility that an event might recur is not enough to overcome mootness, and even a likely recurrence is insufficient if there would be ample opportunity for review at that time." *Al Najjar*, 273 F.3d

at 1336. Wells Fargo argues that its appeal falls within this narrow exception.[19] Although subsequent cash collateral orders in this case may continue to permit the use of cash collateral to pay for the Creditors' Committee's professional fees, this question does not evade review where Wells Fargo will have the opportunity to seek recovery of erroneously disbursed funds should they not be reimbursed for such fees at the conclusion of the avoidance litigation.

B. Jurisdiction

Even if this appeal is not equitably moot and Appellants have standing, this appeal must be dismissed for lack of jurisdiction. Whether I have jurisdiction to hear this appeal is governed by 28 U.S.C. § 158(a), which provides in relevant part:

> The district courts of the United States shall have jurisdiction to hear appeals (1) from final judgments, orders, and decrees... and (3)...with leave of the court, from interlocutory orders and decrees, of bankruptcy judges entered in cases and proceedings referred to the bankruptcy judges under section 157 of this title....

I will discuss in turn why the Cash Collateral Order is not a final order and why leave to file an interlocutory appeal should not be granted.

1. Finality

The U.S. Supreme Court has defined a final order or decision is "one which ends the litigation on the merits and leaves nothing for the court to do but execute the judgment." *Catlin v. United States*, 324 U.S. 229, 233, 65 S. Ct. 631, 89 L. Ed. 911 (1943); In re Donovan, 532 F.3d 1134, 1136 (11th Cir. 2008); *Jove Eng'g v. IRS*, 92 F.3d

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[19] Minority Noteholders do not make this argument, presumably because there are no indications that additional Paydown provisions would be inserted into subsequent cash collateral orders.

1539, 1547 (11th Cir. 1996). Finality is given a more flexible interpretation in the bankruptcy context, however, because bankruptcy is an aggregation of controversies and suits. *Id.* at 1548. Instead, it is generally the particular adversary proceeding or controversy that must have been finally resolved rather than the entire bankruptcy litigation. *Commodore Holdings, Inc. v. Exxon Mobile Corp.*, 331 F.3d 1257, 1259 (11th Cir. 2003); *Jove Eng'g*, 92 F.3d at 1547-48 (courts consistently consider finality in a more pragmatic and less technical way in bankruptcy cases than in other situations because a bankruptcy case is simply an aggregation of controversies, many of which would constitute individual lawsuits had a bankruptcy petition never been filed). But "increased flexibility" does not render appealable an order which does not finally dispose of a claim or adversary proceeding. To be final, a bankruptcy court order must "completely resolve all of the issues pertaining to a discrete claim, including issues as to the proper relief." *In re Donovan*, 532 F.3d at 1136-37 (quoting *In re Atlas*, 210 F.3d 1305, 1308 (11th Cir. 2000)).

a. Minority Noteholders

Debtor argues in their Motion to Dismiss Appeal that two key aspects of the Order require me to conclude that the Cash Collateral Order is in fact not final: first, the Cash Collateral Order contains disgorgement provisions, and second, the expiration of the Order as of December 17, 2008. With respect to the disgorgement provisions, Debtor argues that they contemplate further action by the Bankruptcy Court, as the avoidance action that is ongoing may have an impact on the distribution of the cash collateral depending on the outcome, and that the Cash Collateral Order therefore does not

definitively settle the claim of any party to the cash collateral.[20]

A review of the case law in this Circuit and around the country reveals that there is little authority on the finality of cash collateral orders factually analogous to the one before me. Broadly speaking, however, a conditional order approving the use of a cash collateral is not appealable as a final order. Am. Jur. Bankruptcy § 3786 (a conditional order approving the use of cash collateral is not appealable as final); *In re NSB Film Corp.*, 167 B.R. 176, 180 (B.A.P. 9th Cir. 1994). As in this case, *NSB Film Corp.* involved unsecured creditors' committee's objection to a Chapter 11 debtor's motion to use cash collateral pursuant to stipulation entered into with secured creditors. The Panel held that the bankruptcy order was interlocutory where the bankruptcy court and parties specifically reserved determination of validity, priority, and extent to which creditors were secured and defenses debtor could assert for a later date, and order was conditioned on future determination of issues of whether creditors were entitled to replacement liens or administrative expenses.

While this cash collateral order is not completely analogous to the one before me, the question of whether the Cash Collateral Order is a conditional order is nevertheless relevant to the inquiry of whether it is in fact a final order. Courts have found disgorgement provisions to render a bankruptcy order interlocutory in nature. *See In re Computer Learning Centers, Inc.*, 407 F.3d 656, 661 (4th Cir. 2005) (court's interim award

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[20] By the time the Bankruptcy Court entered the Cash Collateral Order, it had already ruled that Minority Noteholders had colorable fraudulent conveyance claims and was made aware that Minority Noteholders would be bringing them against the First and Second Priority Lenders and their Agents.

of compensation to Chapter 7 trustee and law firm representing him, which was subject to reevaluation and possible disgorgement/enhancement, and which was not immediately payable in full but subject to payment upon further order of the bankruptcy court, was not "final" order, for purposes of appeal); *see Red Line Research Labs., Inc. v. Sgobba*, 110 Fed. App. 11, 13 (9th Cir. 2004) (resolution of the dispute depended on Red Line's ability to demonstrate actual damages, an issue that could only be resolved by further proceedings in bankruptcy court). Here, the disgorgement provision contemplates that final adjudication of the dispute regarding the distribution of the Paydown will depend on the resolution of the fraudulent conveyance litigation.[21] The ongoing avoidance litigation proceedings (before the same Bankruptcy Judge) has the effect of revisiting the rights to the cash collateral granted by the Cash Collateral Order at a later date, undermining the finality of the Order. *See In re Tek-Aids Industries, Inc.*, 145 B.R. 253, 258 n.5 (Bankr. N.D. Ill. 1992) (holding that Draft Interim Cash Collateral Orders were final orders where neither the court nor the parties had any intention to revisit the rights and liens granted by the Orders). Accordingly, only when the Committee does not prevail and the Paydown will not be disgorged can the Minority Noteholders' appeal be considered an appeal of a final order.

In rebuttal, Appellants advance several arguments regarding the finality of the Cash

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[21] The Cash Collateral Order acknowledges the existence of potential adversary proceedings and provides that the Paydown "shall be without prejudice to the right of [] the Creditors' Committee or a party in interest, to the extent such entity has properly filed an adversary proceeding or contested matter...to allege that all or any portion of such payments should be disgorged...." [Order, ¶ 7(d)].

Collateral Order.[22] First, it is argued that the disgorgement provision does not make the Order conditional, but is simply a remedy available to the Creditors' Committee and unsecured creditors should they prove that the Prepetition Lenders are not entitled to the Paydown. The parties cite no legal authority for this distinction, and my research has revealed no helpful guidance on this point. Second, Appellants contend that cash collateral orders have been regarded as final in other jurisdictions. While certainly true, the cases cited by Appellants are largely inapposite because the facts of those cases are highly distinguishable from those here.[23] Lastly, the parties point to the fact that the Cash Collateral Order is labeled a "Stipulated Final Order" and entered after "a final hearing on the use of Cash Collateral" [Bankr. DE 1226, 1]. Such labels, however, are not and cannot be dispositive of the question of finality.

Applying the guiding principles on finality set forth by the Eleventh Circuit and in light of case law discussing disgorgement provisions and the effect of other related

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[22] On the question of finality, Appellee CNAI sides with Appellants and argues that the Cash Collateral Order if final.

[23] In *Wattson Pacific Ventures v. Valley Fed. Sav. & Loan*, 2 F.3d 967, 969 (9th Cir. 1993), the Court held that an order granting a debtor use over funds alleged to be cash collateral requires immediate appellate review. This is not the issue here, where there is no dispute that the funds to be used is part of the cash collateral. *Zahn v. Fink*, 367 B.R. 654 (B.A.P. 8th Cir. 2007) concerned the finality of a bankruptcy order denying confirmation plan under Chapter 13 of the Bankruptcy Code and is inapposite to this case. The Court in *IRS v. Patriot Contracting Corp.*, 2007 WL 433392 (D.N.J., Feb. 7, 2007) concluded that the cash collateral order at issue was *non*-final and did not discuss why an earlier cash collateral order was deemed final. *MBank Dallas, N.A. v. O'Connor*, 808 F.2d 1393 (10th Cir. 1987) stands only for the proposition that if the bankruptcy court's order was final for the purpose of appeal to the district court, the district court's order is final for the purpose of appeal to the circuit court. Finally, *In re Glen Prop.*, 168 B.R. 537 (D.N.J. 1993) concerned a bankruptcy order determining certain assets of the estate were not cash collateral.

bankruptcy proceedings, I conclude that the Cash Collateral Order is a conditional order dependent on the outcome of the ongoing avoidance litigation before there can be a final adjudication of the rights by the competing parties to the Paydown.[24] Accordingly, I conclude that the Cash Collateral Order is a non-final interlocutory order as to Minority Noteholders' appeal of the Paydown provision.

b. Wells Fargo

The Cash Collateral Order is similarly non-final as to the appeal by Wells Fargo. The cash collateral used to fund the professional fees of the Creditors' Committee is not awarded on a final basis. An award of interim professional fees is interlocutory in nature. *In re Callister*, 673 F.2d 305, 307 (10th Cir. 1982) ("interim award are in no respect final adjudications on the question of compensation...[s]uch awards are therefore interlocutory); *In re Valley Forge Plaza Assocs.*, 119 B.R. 471, 472 (E.D. Pa. 1990). Here, under the Cash Collateral Order, Wells Fargo is awarded administrative priority claims for reimbursement of cash expended to fund the avoidance action if Wells Fargo prevails, with such recovery subordinate in priority to the First Priority Liens and claims.[25] [Order, ¶7(b)]. Although Wells Fargo argued at oral argument that the chances of recovering such fees is slim, a point disputed by other parties, the Cash Collateral Order nonetheless explicitly provides for reimbursement to Wells Fargo of the Creditors' Committee's

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[24] Because I conclude that the disgorgement provisions render the Cash Collateral Order a non-final order as to the Minority Noteholders' appeal, I do not reach the question of whether the purported expiration of the Cash Collateral Order on December 17, 2008 is sufficient to render the Cash Collateral Order a non-final order

[25] At oral argument, Wells Fargo acknowledges that they do not recover the professional fees if the Creditors' Committee prevails in the avoidance litigation.

professional fees under certain circumstances. Accordingly, the use of cash collateral to fund the professional fees of the Creditors' Committee is interlocutory in nature.

Further, the Cash Collateral Order permits Wells Fargo to seek "different or additional adequate protection at any time...in connection with the incurrence of Professional Fees...." [Order, ¶15(b)]. This provision by its terms gives Wells Fargo the opportunity to contest any request for the payment of fees and expenses, including the Creditors' Committee's interim fee applications, and such interim awards would remain subject to the review and revision of the Bankruptcy Court. Courts have found bankruptcy rulings to be interlocutory where they are "open to reexamination" and open to subsequent challenge. *In re Charter Co.*, 778 F.2d 617, 621 (11th Cir. 1985) (bankruptcy court ruling interlocutory where the court advised the parties that its ruling would be open to reexamination). Here, the Cash Collateral Order preserves Wells Fargo's ability to seek additional adequate protection for the use of its cash collateral for the Creditors' Committee's professional fees, which reflects the Bankruptcy Court's intent to "reexamine" such use of the cash collateral on an ongoing basis. Because the fee awards are interim in nature and the Cash Collateral Order is structured to permit further reexamination by the Bankruptcy Court, the Order is not final with respect to Wells Fargo's appeal.

2. Interlocutory Appeal

Although there is no finality, jurisdiction may still be proper if I conclude this is a proper interlocutory appeal pursuant to 28 U.S.C. § 158(a)(3). Although Appellants have not moved for leave to file an interlocutory appeal, I have the discretion to consider a timely filed Notice of Appeal as a motion for leave to do so. Fed. R. Bankr. P. 8003(c).

Interlocutory review is generally disfavored for its piecemeal effect on cases. *United States v. MacDonald*, 435 U.S. 850, 853, 98 S.Ct. 1547, 56 L.Ed.2d 18 (1978); *Prado-Steiman ex rel. Prado v. Bush*, 221 F.3d 1266, 1276 (11th Cir. 2000); *In re Pac. Forest Prods. Corp.*, 335 B.R. 910, 919 (S.D. Fla. 2005). Nonetheless, district courts have discretion to grant interlocutory review of bankruptcy court orders if the bankruptcy order "(1) involves a controlling question of law, (2) as to which there is a substantial ground for difference of opinion, and (3) is such that an immediate appeal would advance the ultimate termination of the litigation." *In re Pac. Forest Prods. Corp.*, 335 B.R. at 919; *In re Ashoka Enters., Inc.*, 156 B.R. 343, 346 (S.D. Fla. 1993).[26] Leave must be denied if the party seeking leave to appeal fails to establish any one of the three elements. *Celotex Corp.*, 187 B.R. at 749. Further, the Eleventh Circuit has stated that "the legal question must be stated at a high enough level of abstraction to lift the question out of the details of the evidence or facts of a particular case and give it general relevance to other cases in the same area of law [and] the answer to that question must substantially reduce the amount of litigation left in the case." *McFarlin v. Conseco Servs., LLC*, 381 F.3d 1251, 1259 (11th Cir. 2004).

a. Controlling question of law

To satisfy this portion of the standard, the movant must demonstrate that there is

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[26] This three-part standard is analogous to that set forth in 28 U.S.C. § 1292(b), which governs appeals from the district court to the circuit court of appeals. *In re Celotex Corp.*, 187 B.R. 746, 749 (M.D. Fla.1995) (in determining when to exercise this discretionary authority, a district court will look to the standards which govern interlocutory appeals from the district court to the court of appeals pursuant to 28 U.S.C. § 1292(b).)

a question of *law*, and it is *controlling*. *In re Pac. Forest Prods. Corp.*, 335 B.R. at 919 (quoting *Ahrenholz v. Bd. of Tr. of the Univ. of Ill.*, 219 F.3d 674, 675 (7th Cir. 2000)) (emphasis in original). Indeed, an issue meets this exacting standard if it deals with a question of "pure" law, or matters that can be decided "quickly and cleanly without having to study the record." *McFarlin v. Conseco Servs., LLC*, 381 F.3d 1251, 1258, 1260-62 (11th Cir. 2004) (finding that because the issues presented involved application of the facts to the law, the movant could not prove a "controlling question of law") (quoting *Ahrenholz*, 219 F.3d at 677 (7th Cir. 2000))

The "antithesis of a proper § 1292(b) appeal is one that turns on whether there is a genuine issue of fact or whether the district court properly applied settled law to the facts or evidence." *McFarlin*, 381 F.3d at 1259. Instead, a controlling question is one that rises from the details of the case to a place of relevance among similar cases. *Id.*; *see also Auto Dealer Servs., Inc.*, 81 B.R. at 96 (advising that a question is controlling not just because it determines the case at issue, but it must also dispose of a "wide spectrum of cases."); (quoting *Federal Deposit Ins. v. First Nat'l Bank of Waukesha*, 604 F.Supp. 616, 620 (E.D. Wis. 1985)).

As discussed above, Minority Noteholders object not to the whole Cash Collateral Order, but merely the provisions authorizing the Paydown. The limited questions on appeal, as it relates to Minority Noteholders, is whether the Bankruptcy Court is required to undertake a collateral diminution of value hearing on a consensual cash collateral order when an unsecured creditor objects, and whether the standard to be applied by the Bankruptcy Court to a purported settlement of the adequate protection issue is a 'business

judgment' standard or a 'best interest of the estates' standard. With respect to Wells Fargo, the question on appeal is whether a debtor is required to prove that a secured creditor was adequately protected before its cash collateral could be used. These questions are controlling questions of law that are sufficiently abstract and have applicability to cases other than the one before me.

b. Substantial Grounds for Difference of Opinion

To satisfy this element of the analysis, a movant must normally demonstrate that at least two courts interpret the relevant legal principle differently. *In re Auto Dealer Servs., Inc.*, 81 B.R. at 97. It is simply not enough for interlocutory review that the order for which appeal is sought presents a difficult ruling; nor is it sufficient that the movant can demonstrate a lack of authority on the issue. *Id.* at 96; *Carbotrade SpA v. Bureau Veritas*, 1993 WL 60567, at *1 (S.D.N.Y. Mar. 2, 1993) (ruling that an issue of first impression is insufficient to establish that there are substantial grounds for difference of opinion). And where there is controlling authority in the jurisdiction where the order was rendered, there cannot be a substantial difference of opinion. *In re Pac. Forest Prods. Corp.*, 335 B.R. at 922 (S.D. Fla. 2005).

In fulfilling its inquiry, a court may consider authority from within and beyond the circuit in which it sits. *In re Lykes Bros. Steamship Co.*, 200 B.R. 933, 938 (M.D. Fla. 1996) (finding substantial ground for difference of opinion based upon cases cited in appellants' briefs and case law identified from other jurisdictions); *Managed Care Litig.*, 2002 WL 1359736, at *2 (finding a substantial ground for difference of opinion after considering contradictory decisions "reached by this court and by courts in other circuits.").

As discussed below in Section V.C where I discuss the merits of the appeal, there is contradictory case law on the questions of law raised by this appeal.

c. Advancing the Ultimate Termination of Litigation

Interlocutory appeal is appropriate if determination of the appellate issue will advance the ultimate termination of the litigation. *McFarlin*, 381 F.3d at 1259; *Lykes Bros. Steamship Co.*, 200 B.R. 933, 938 (M.D. Fla. 1996). This requirement means that "resolution of a controlling legal question would serve to avoid a trial or otherwise substantially shorten the litigation." *McFarlin*, 381 F.3d at 1259. Relevant to that analysis is whether a decision on the merits will clarify the issue for other bankruptcy litigants, and otherwise "preclude the need for further appeals of this type which delay the bankruptcy proceedings." *Id.*

A court considering interlocutory review must also evaluate the stage of litigation and weigh the disruptive effect of an immediate appeal on the Bankruptcy Court proceedings against the probability that resources will be wasted in allowing those proceedings to go forward. *In re Auto Dealer Servs., Inc.*, 81 B.R. at 97 (citing *Lorentz v. Westinghouse Elec. Corp.*, 472 F.Supp. 954, 956 (W.D. Pa. 1979) (declining interlocutory review where discovery had been completed, and four claims still remained to be tried)); *see also* McFarlin, 381 F.3d at 1262 (finding that interlocutory appellate decision would not advance litigation as other claims remained pending).

At the present stage of the bankruptcy proceedings, wherein a Second Stipulated Cash Collateral Order [Bankr. DE 2355] has already been entered, a reversal or remand of selected portions of the Cash Collateral Order would be highly disruptive to the

reorganization process by requiring the parties to contest and litigate the diminution in value of the cash collateral or adequate protection as to Wells Fargo as of the time period when the Cash Collateral Order was being negotiated. Such litigation will delay and divert resources from Debtor's reorganization process and potentially jeopardize the Debtor's future access to cash collateral. Such a result would require Debtor to engage in precisely the risky and expensive strategy that they sought to avoid by entering into a consensual cash collateral agreement, a decision that I conclude below was appropriately approved by the Bankruptcy Court. Further, permitting this appeal to go forward does little to terminate litigation in light of the fact that no further paydowns to the Prepetition Lenders are presently contemplated and Wells Fargo has the ability to seek additional adequate protection from the Bankruptcy Court. Accordingly, because entertaining this appeal will not advance the ultimate termination of litigation, leave for Appellants to file interlocutory appeals is denied.

C. Merits

1. Applicable Standard for Approving Cash Collateral Stipulation

Even assuming this appeal is justiciable and I have jurisdiction, I similarly hold in favor of Appellees on the merits of this appeal. As discussed in detail above, the Cash Collateral Order represents the result of extensive negotiations between parties over the course of several months, and included numerous modifications made to accommodate the objections expressed by various constituencies. The Order further includes modifications required by the Bankruptcy Court. A review of the proceedings below indicate that the Bankruptcy Court ultimately found that the consensual Cash Collateral

Order satisfied the "business judgment" standard and the "best interests of the estate standard."[27]

Appellants argue not only that the Cash Collateral Order should not have been approved under these standards, but that applying the business judgment standard was in error, and that the Bankruptcy Court should have instead applied the factors set forth in *In re Justice Oaks II, Ltd.*, 898 F.2d 1544, 1549 (11th Cir. 1990), which are applicable to a court's approval of a proposed settlement. However, there is significant case law to support the use of the business judgment standard in approving a consensual Cash Collateral Order. *In re Beechgrove Redevelopment, LLC*, 2007 WL 4414777, *1 (Bankr. E.D. La., Dec. 13, 2007) ("The terms of the DIP Agreement and the use of Cash Collateral, are fair and reasonable, reflect the debtors' exercise of prudent business judgment consistent with its fiduciary duties, and constitute reasonably equivalent value and fair consideration"); *In re Mastercraft Interiors, Ltd.*, 2006 WL 4595946, *4 (Bankr. D. Md., Aug. 10, 2006) ("Entry of this Order...is in the best interests of debtors, their creditors and their estate. The terms of the proposed financing and use of Cash Collateral appear fair and reasonable, reflect debtors' exercise of business judgment and are supported by reasonably equivalent value and fair consideration, and is the product of extensive negotiations between the Debtor, the Lenders, and the Committee, and has the consent of the Committee"); *In re New World Pasta Co.*, 2004 WL 5651052 (Bankr. M.D. Pa., Jul.

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[27] The Bankruptcy Court stated at the June 10, 2008 hearing: Whether I apply a business judgment test and defer to the sound business judgment of the debtor or look at this from the question of the best interest of the estate, I have to conclude that a consensual cash collateral agreement is in the debtors' and all constituencies' best interest. [Bankr. DE 1214, 268:21]

9, 2004) (same); *In re First NLC Fin. Servs., LLC*, No. 08-10632, DE 232 (Bankr. S.D. Fla., Feb. 28, 2008) (unpublished) (same); *see generally* 7 Collier on Bankruptcy ¶ 1100.01, p. 1100-6 (15th ed. rev. 2003).[28]

Here, the Paydown was negotiated as consideration for access to the cash collateral. There was substantial evidence before the Bankruptcy Court that continuous access to cash was critical to prevent the Debtor's business from shutting down and that even a successful contested valuation hearing could injure the Debtor's business operations because it would divert key resources from Debtor's businesses and reorganization efforts. Debtor further presented adequate evidence that even after the Paydown, they maintained sufficient liquidity to continue under their comprehensive business plan. [Bankr. DE 1214, 62:1, 63:1]; [Bankr. DE 1009, ¶ 39]. Further, by using excess cash on hand to repay a portion of indebtedness to the First Lien Lenders, Debtors were able to reduce their interest expense by approximately $ 1 million per month. [Bankr. DE 1076, 202:15]. Debtor's agreement to the Paydown was in its business judgment, reasonable consideration for First Lien Lenders' consent to permit continued access to cash necessary to the survival of the business. Accordingly, the Bankruptcy Court's deference to the business judgment of Debtor was not in error.

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[28] 7 Collier on Bankruptcy ¶ 1100.01 provides in pertinent part: "The hallmark of chapter 11 is flexibility. The debtor in possession is offered considerable discretion in the ordinary operation of the business, constrained generally only by a business judgment rule. The plan negotiation process is intended to lead normally to a consensual plan under which the debtor and a majority of creditors have agreed to both business and financial plans that offer some realistic chance of success. The court is given considerable discretion in evaluating a debtor's proposed use of property, offer of adequate protection, proposed borrowing, and other business decisions."

Even under a more stringent best interests of the estate standard, which Minority Noteholders contend is applicable, the Bankruptcy Court properly found that the standard was met.[29] To determine that a settlement is in the best interests of the estate, the settlement must be "fair and equitable." *Protective Comm. for Indep. Stockholders of TMT Trailer Ferry, Inc. v. Anderson*, 390 U.S. 414, 424 (1968). Here, interwoven with the business judgment of Debtor to secure consent from the First Lien Lenders were Debtor's attempts to formulate disgorgement provisions that would permit the anticipated avoidance litigation by the Creditors' Committee. At the June 10 hearing, the Creditors' Committee was continuing to voice objections regarding the Paydown, and strenuously argued that Debtor was giving in too much to the demands of the First Lien Lenders. [Bankr. DE 1214, 117:2]. In the days leading up to the entry of the Order, significant efforts were made to secure the consent of the Creditors' Committee. As reflected by the telephonic conference on June 19, 2008, counsel for the Creditors' Committee stated that "this order is the culmination of extensive...good faith negotiations for the most part among the debtors, the first lien agents, and the creditors' committee" and countered the Minority Noteholders' arguments about the ineffectiveness of the disgorgement provision by stating that the "heavily negotiated" disgorgement provisions were robust and provided significant protection for unsecured creditors. [Bankr. DE 1349, 17:15; 23:14]. Securing the consent

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[29] Minority Noteholders cite *In re AppliedTheory Corp.*, 2008 WL 1869770 (Bankr. S.D.N.Y. 2008) for this proposition. The Court in *AppliedTheory Corp.* held that when reviewing a settlement, the bankruptcy court is to determine whether the settlement is in the best interests of the estate, which requires it to "canvass the issues and see whether the settlement falls below the lowest point in the range of reasonableness." *Id.* at *3 (internal citations omitted).

of the Creditors' Committee, which acts as a fiduciary to all unsecured creditors, is an important indicator that Debtor was in fact trying to take a "middle of the road approach" that would "maximize value" for Debtors' business and be "fair and reasonable" even though such a compromise was "likely unsatisfactory to all parties." [Bankr. DE 1214, 74:14].

Based on the evidence put forth by Debtor and the position taken by the Creditors' Committee, the Bankruptcy Court had ample support to conclude that the consensual Cash Collateral Order was premised on Debtor's reasoned business judgment and represented a fair and equitable compromise. Accordingly, approval of the Cash Collateral Order was appropriate under both the business judgment standard.[30]

2. Approval of Paydown Provision

Despite having adequate factual support to conclude the consens ual Cash Collateral Order satisfied the business judgment standard, a Bankruptcy Court cannot permit the parties to consent around the requirements of the Code. *In re M4 Enterprises, Inc.*, 183 B.R. 981, 985-86 (N.D. Ga. 1995) (parties may not avoid prohibitions of Bankruptcy Code by merely entering into a consensual agreement). Minority Noteholders contend that that the Code does not permit an adequate protection payment to be made to a secured creditor except to the extent the value of the creditor's interest in the

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[30] Because I conclude that the business judgment standard to be applicable here and that the Bankruptcy Court properly applied the standard, I do not reach the question of whether the *Justice Oaks* factors were properly analyzed by the Bankruptcy Court. I note only that an extensive discussion of whether the Cash Collateral Order satisfied the *Justice Oaks* factors took place at the June 10, 2008 hearing. [Bankr. DE 1349, 102:20].

collateral is diminishing, regardless of whether the payment is made on consent or after a contested hearing. Because Debtor failed to demonstrate diminution of value, the Paydown was prohibited by the Code.

Minority Noteholders rely on 11 U.S.C. § 361(1), which they argue is triggered because an adequate protection payment has been made pursuant to 11 U.S.C. § 363. 11 U.S.C. § 361(1) provides in pertinent part:

> "*When adequate protection is required under section...363...of this title* of an interest of an entity in property, such adequate protection may be provided by–(1) requiring the trustee to make a cash payment of periodic cash payments to such entity, to the extent that the...use, sale, or lease under section 363...results in a decrease in the value of such entity's interest in such property."[31] (emphasis added).

The parties offer competing case law support, the vast majority being Bankruptcy Court decisions, as to whether under a consensual cash collateral order, § 361(1) is triggered because "adequate protection is required under section 363." The best authority offered by Minority Noteholders is *In re Gallegos Research Group, Corp.*, 193 B.R. 577 (Bankr. D. Colo. 1995). In *Gallegos Research*, which concerned consensual cash collateral agreements, the court found that § 361 governed the analysis of when an adequate protection payment was appropriate and refused to approve the agreements because they did not contain the necessary information about the amount, extent and priority of the secured creditor's claim as well as representations as to the diminution of the value of

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[31] 11 U.S.C. § 361, however, provides a list of nonexclusive examples of adequate protection. Besides cash payments, adequate protection can take the form of additional or replacement liens. Under § 361(3) courts may fashion other forms of adequate protection based upon equitable considerations arising from the particular facts in each case.

such collateral. *Id.* at 584, 585.

More persuasive, however, is a later case from the Second Circuit that takes a contrary position. In *In re Blackwood Associates, L.P.*, the Court held that "if a debtor seeks authorization to use cash collateral from the bankruptcy court under § 363(c)(2)(B), rather than seeking the consent of a secured creditor under § 363(c)(2)(A), the bankruptcy court "shall prohibit or condition such use, sale, or lease as is necessary to provide adequate protection" for the secured creditor's interest as provided by 11 U.S.C. § 363(e)." 153 F.3d 61, 67 (2d Cir. 1998); *see also In re George Ruggiere Chrysler-Plymouth, Inc.*, 727 F.2d 1017, 1019 (11th Cir. 1984) (when a secred creditor *opposes* a propose use of cash collateral, the guiding inquiry is whether its security interests are "adequately protected" under § 363(e)); *In re Salem Plaza Assoc.*, 135 B.R. 753, 758 (Bankr. S.D.N.Y. 1992) (because secured creditor does not consent under § 363(c)(2)(A), we are required to condition Debtor's use of secured creditor's cash collateral "as is necessary to provide adequate protection of such interest" under § 363(e)). These cases provide that where there is consent to use the cash collateral, conditioning its use as is necessary to provide adequate protection of such interest is not *required* under § 363.[32] By its terms, then, § 361 is not triggered and there is no requirement that Debtor demonstrate diminution of value.[33] Accordingly, approving the Paydown without a showing of diminution of value was not prohibited by the Code.

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[32] Such an interpretation further takes into account the disjunctive nature of 11 U.S.C. § 363(c)(2).

[33] As touched upon in Section V.C.3, there was in fact evidence that the value of the collateral was diminishing.

3. Adequate Protection of Wells Fargo

Wells Fargo argues that because it did not consent to the Cash Collateral Order, Debtor was required to prove pursuant to 11 U.S.C § 363(e) that Wells Fargo was adequately protected before its cash collateral could be used. Setting aside my conclusion that Wells Fargo has consented to the Cash Collateral Order and that its objection to the use of the cash collateral to fund the avoidance action was properly overruled by the Bankruptcy Court, I conclude that based on the limited record available, the Bankruptcy Court properly approved the inclusion of the provision permitting the use of the cash collateral to fund the avoidance action.

Oversecured creditors may not be entitled to cash payments or postpetition liens because they are adequately protected through the existence of a value cushion. Whether a value cushion is sufficient to provide adequate protection must be determined by the facts in each case. *In re Kost*, 102 B.R. 829, 831 (D. Wyo.1989); *In re Johnson*, 90 B.R. 973, 980 (Bankr. D. Minn.1988); *In re Heath*, 79 B.R. 616, 618 (Bankr. E.D. Pa.1987). Further, whether a secured creditor is adequately protected is a question of fact. *In re O'Connor*, 808 F.2d 1393, 1397 (10th Cir. 1987). A review of the record indicates that on the issue of adequate protection, the pertinent evidence before the Bankruptcy Court was limited. On May 14, 2008 hearing concerning proofs of claims, Wells Fargo indicated it was over-secured. [Bankr. DE 1034, 9:5]. Subsequently, at the May 22 hearing, Mr. Boken testified that there is a material risk of a decline in value of the business over the next six months. [Bankr. DE 1076, 214:221]. Finally, at the June 10 hearing, Mr. Boken confirmed his May 22 testimony and further testified that he was not in a position to

conclude whether there was an equity cushion "beyond the second liens." [Bankr. DE 1214, 87:9]. There was, however, no evidence to show that Wells Fargo was in fact under-secured. On such a limited record, the Bankruptcy Court did not err by not conditioning the use of the cash collateral on a showing of adequate protection.

Further, under the Cash Collateral Order, Wells Fargo is granted "allowed administrative priority claims under section 507(b) of the Bankruptcy Code for any diminution in value of the Prepetition Collateral" resulting from the use of the cash collateral to fund the investigation, initiation and prosecution of avoidance actions [Order, ¶ 7(b)]. As additional adequate protection of Wells Fargo's interests in the Prepetition Collateral, Wells Fargo is granted adequate protection liens (replacement liens) that are subordinate in priority to those of the First Lien Lenders. [Order, ¶ 7(a)]. Moreover, the Cash Collateral Order expressly reserves the rights of Wells Fargo to seek "modification of the grant of adequate protection provided [by the Order] at any time...in connection with the incurrence of Professional Fees." [Order, ¶ 15]. Such protections for Wells Fargo support the Bankruptcy Court's conclusion that Wells Fargo would be adequately protected for the use of cash collateral to fund the Creditors' Committee's avoidance action.

VI. CONCLUSION

For the foregoing reasons, I dismiss the Appellants' consolidated appeals for non-justiciability and lack of jurisdiction. Accordingly, it is hereby

ORDERED and ADJUDGED that

1. The Appeals are DISMISSED.

2. The Cash Collateral Order [Bankr. DE 1226] is AFFIRMED.

3. This consolidated case is CLOSED.

DONE and ORDERED in Chambers in Miami, Florida, this 5 day of February, 2009.

THE HONORABLE ALAN S. GOLD
UNITED STATES DISTRICT JUDGE

cc:
U.S. Bankruptcy Judge John K. Olson
U.S. Magistrate Judge Chris M. McAliley
All counsel of record